

ORIGINAL

No. 7990

United States
Circuit Court of Appeals

For the Ninth Circuit.

W. J. DONALD, Receiver of the Nogales National
Bank of Nogales, Arizona, an insolvent corpo-
ration,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Arizona.

FILED

DEC 21 1935

PAUL W. O'BRIEN,
CLERK

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Upon Appeal from the District Court of the United
States for the District of Arizona.

ATTORNEYS OF RECORD

STEPHEN D. MONAHAN,
Nogales, Arizona,
Attorney for Appellant.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBBINS,
Nogales, Arizona,
Attorneys for Appellee. [3*]

In the District Court of the United States in and
for the District of Arizona
L-654-Tucson

W. J. DONALD, Receiver of the Nogales National
Bank of Nogales, Arizona, a corporation,
Plaintiff,

vs.

E. K. CUMMING,
Defendant.

COMPLAINT AT LAW

Suit to Collect Statutory Liability.

The plaintiff complains and for cause of action
against the defendant alleges:

I.

That the Nogales National Bank of Nogales,
Arizona, is a corporation, duly organized and exist-

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

ing under the national banking laws of the United States of America, having a capital stock of Fifty thousand dollars (\$50,000.00) divided into five hundred (500) shares of the par value of one hundred dollars (\$100.00) per share, with its principal place of business in the city of Nogales, County of Santa Cruz, State of Arizona, and has at all times hereinafter mentioned been doing a general banking business in the said city of Nogales until on or about the thirtieth day of November, 1931, when said bank voluntarily suspended business, and that on or about the eleventh day of December 1931, the Honorable Comptroller of the currency of the United States, who since the suspension of business by said bank, had been in charge thereof, determined the same to be in an insolvent condition, and appointed a receiver therefor, that this said receiver C. L. Ezell failed to accept the said appointment as receiver and that thereafter on or about December 15th, 1931, the said Comptroller appointed as receiver therefor Edwin B. Patton who thereupon took charge of the business of the said bank for the purpose of liquidating its assets and winding up its affairs, and that the said Edwin B. [4] Patton thereafter on or about February 13th, 1932, resigned as receiver of the said bank whereupon on or about February 13th, 1932, the said Comptroller appointed W. J. Donald as receiver for the said bank for the purpose of liquidating its assets and winding up its affairs, and that the said W. J. Donald, the plaintiff herein, is

now the duly appointed, qualified and acting receiver thereof.

That the defendant is a resident of Santa Cruz County, State of Arizona.

II.

That heretofore and before the closing and suspension of business by said bank, the defendant, E. K. Cumming became and was the owner of and in possession of ten (10) shares of the capital stock of the said Nogales National Bank of Nogales, Arizona, of a par or face value of \$100.00 per share, or a total of One thousand (\$1,000.00) dollars of the capital stock of said corporation, the same standing on the books of said corporation in his name up to and on January 14th, 1932.

III.

That on or about the 14th day of January, 1932, the Honorable Comptroller of the Currency of the United States, being fully advised of the condition of the said bank, and for the purpose of paying the liabilities thereof, decided to and did levy an assessment upon the capital stock and stockholders of the said Nogales National Bank of Nogales, Arizona, to the full amount of the par value thereof, or the sum of One hundred dollars (\$100.00) upon each and every share of the capital stock of the said corporation, held or owned by such stockholders respectively, at the time of the failure of the said bank

and upon all persons liable therefor under the provisions of Sections 5151 and 5234 of the Revised Statutes of the United States and Section 1, C,156, Act of June 30th, 1876, and Section 23 of the Act approved December 23rd, 1913, known as the Federal Reserve Act, and directed the said receiver, W. J. Donald, plaintiff herein, to take all necessary proceedings to enforce the liability of the said stockholders [5] a copy of which order of the said Comptroller is attached to the complaint, marked "Exhibit A", and is made a part hereof.

IV.

That on or about the thirtieth day of January, 1932, the plaintiff made demand upon the defendant herein for the payment, on or before February 23rd, 1932, of the amount so levied upon said shares of capital stock under the order of the said Comptroller of the Currency, to-wit: the sum of One Thousand dollars (\$1,000.00) but that the defendant has failed to pay the said sum or any part thereof and by reason of the facts above set forth and the provisions of Section 23, of the act, approved December 23rd, 1913, known as the Federal Reserve Act, Laws of the United States, the whole of said sum is now due and owing from defendant to this plaintiff as Receiver of the said Nogales National Bank of Nogales, Arizona.

WHEREFORE, plaintiff prays judgment against defendant for the sum of One Thousand Dollars, together with the interest thereon at the rate of six

percent per annum from the 23rd day of February, 1932, until paid and for his costs in this suit expended.

STEPHEN D. MONAHAN,
Attorney for Plaintiff.

State of Arizona,
County of Santa Cruz—ss.

W. J. Donald, being first duly sworn, deposes and says: That he is the receiver in charge of the affairs of the Nogales National Bank of Nogales, Arizona, and the plaintiff herein, and makes this affidavit as such receiver: That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

W. J. DONALD.

Subscribed and sworn to before me by the said W. J. Donald this 11th day of January, 1935.

[Notarial Seal]

J. FIGUERAS,
Notary Public.

My Commission expires Feb. 24, 1935. [6]

EXHIBIT A.

Copy of
ASSESSMENT UPON SHAREHOLDERS.

TREASURY DEPARTMENT
Office of the Comptroller
of the Currency.

Washington, January 14, 1932.

In the Matter of
The Nogales National Bank,
Nogales, Arizona.

TO ALL WHOM IT MAY CONCERN:

WHEREAS, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The Nogales National Bank", Nogales, Arizona, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act.

NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Nogales National Bank" for Fifty Thousand (\$50,000.00) dollars, to be paid by them on or before the twenty-third day of February, 1932,

and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Edwin B. Patton the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fourteenth day of January, A. D. 1932.

[Seal] (Signed) JOHN L. PROCTOR,
Acting Comptroller of the Currency. [7]

[Endorsed]: Filed Jan. 12, 1935. [8]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant above named and in answer to plaintiff's complaint in the above entitled action, defendant demurs to said complaint for each of the following separate reasons and upon each of the following separate grounds, to-wit:

(1) That it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the provisions of Section 2058 of the Revised Code of 1928 of the State of Arizona.

(2) That it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the provisions of Section 227 of the Revised Code of 1928 of the State of Arizona.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that defendant have judgment against the plaintiff for his costs.

JAMES V. ROBBINS,

Trust Bldg.,

Nogales, Arizona,

DUANE BIRD,

THOMAS L. HALL,

La Ville de Paris Bldg.,

Nogales, Arizona,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 13, 1935. [9]

In the United States District Court for the District
of Arizona.

May 1935 Term

At Tucson

MONDAY, JUNE 10, 1935

(Tucson General Minutes)

Honorable Albert M. Sames, United States Dis-
trict Judge, Presiding.

L-654

W. J. DONALD, Receiver of the Nogales National
Bank of Nogales, Arizona, a corporation,
Plaintiff,

vs.

E. K. CUMMING,

Defendant.

ORDER SUSTAINING DEMURRER AND
DISMISSING CASE.

Defendant's Demurrer to the Complaint having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Demurrer to the Complaint be and the same is hereby sustained and that this case be dismissed, and that an exception be entered on behalf of the Plaintiff.

[Title of Court and Cause.]

PETITION FOR APPEAL.

To: Honorable Albert M. Sames, Judge, United States District Court, District of Arizona.

Comes now the above-named plaintiff, W. J. Donald, Receiver, and feeling aggrieved by the decree of the above-entitled Court, made and entered in the above-numbered and entitled cause under date of the tenth day of June, 1935, sustaining the demurrer to the plaintiff's Complaint heretofore filed in said Court and cause, and dismissing the above-entitled action, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignments of Error, filed herewith; and

Said plaintiff does respectfully pray that his appeal be allowed and that the citation upon appeal issue as provided by law; and that a transcript of the record, proceedings and documents upon which said final decree was based, duly authenticated, be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, within said Circuit as does the law and the rules of such Court, in such cases made and provided, require. [11]

Said plaintiff further prays that whereas this appeal is made by direction of the Comptroller of the United States Currency, an order be entered directing that this appellant not be required to file a cost bond herein.

STEPHEN D. MONAHAN,
Attorney for Plaintiff.

We hereby accept service of written Petition for Appeal and acknowledge receipt of a true copy thereof at Nogales within the District of Arizona this 3d day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [12]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the plaintiff, W. J. Donald, Receiver, by Stephen D. Monahan, his attorney of record herein, and in connection with his Petition for Appeal, herewith filed, makes it known that in the record, proceedings and the decree appealed from, manifest error has intervened to the prejudice of this plaintiff in these things, to-wit:

1. The District Court erred in sustaining the demurrer to plaintiff's complaint, filed in the above entitled action, and in dismissing said action because said complaint was filed within the three year period as prescribed in Section 2060, Paragraph 1, and in Section 227, both of the Revised Statutes of Arizona, 1928;

By reason whereof, plaintiff prays that the decree appealed from may be reversed and remanded and

that an order for judgment for the plaintiff be entered in accordance with the law and the prayers in said complaint.

STEPHEN D. MONAHAN,
Attorney for Plaintiff. [13]

We hereby accept service of the foregoing assignments of error and acknowledge receipt of a true copy thereof at Nogales, within the District of Arizona, this 3d day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [14]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The plaintiff above named, having within the time prescribed by law, duly filed herein his Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the above entitled District Court, made and entered in the above numbered and entitled cause under date of the tenth day of June, 1935, sustaining the Demurrer of the defendants and dismissing plaintiff's Complaint and dismissing the action;

It is ordered that the plaintiff's appeal to the United States Circuit Court of Appeals for the

Ninth Circuit from the decree of the District Court hereinabove referred to, be, and the same is, hereby allowed;

It is further ordered that a certified transcript of so much of the record as may be requested by proper praecipe therefore be, by the Clerk of this Court, upon the filing of such praecipe, transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered, that this Appeal having been directed by the Comptroller of the United States Currency, [15] that no bond be required.

Done in open court this 6th day of September, 1935.

ALBERT M. SAMES,
Judge, United States District Court.
District of Arizona.

We hereby acknowledge and accept service of the foregoing Order Allowing Appeal and acknowledge receipt of a true copy thereof at Nogales, within the District of Arizona, this 6th day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [16]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above entitled Court:

YOU ARE HEREBY DIRECTED to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit and to include therein the following:

1. Plaintiff's Complaint to enforce stockholder's liability.

2. Demurrer of E. K. Cumming to Plaintiff's Complaint.

3. Decree sustaining Demurrer entered herein June 10th, 1935.

4. Plaintiff's Petition for Appeal, filed herein on the 6th day of September, 1935.

5. Plaintiff's Assignments of Error, filed herein on the 6th day of September, 1935.

6. Order Allowing Appeal, filed the 6th day of September, 1935.

7. Citation on appeal, filed on the 6th day of September, 1935. [17]

8. This Praecipe.

9. Notice of filing praecipe for record on appeal filed herein on the day of September, 1935.

Dated this 6th day of September, 1935.

STEPHEN D. MONAHAN

Attorney for Plaintiff.

[Endorsed]: Filed Sep. 6, 1935. [18]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR
RECORD ON APPEAL.

To the defendant E. K. Cumming and to Duane Bird, Thomas Hall, and James V. Robins, attorneys for defendant:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE THAT on the 6th day of September, 1935, the undersigned filed with the Clerk of the United States District Court for the District of Arizona a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, upon appeal taken by the said plaintiff in the above numbered and entitled cause, a copy of which praecipe is herewith served upon you.

Dated this 6th day of September, 1935.

STEPHEN D. MONAHAN

Attorney for Plaintiff. [19]

We hereby accept service of the above and foregoing notice and acknowledge receipt of a true copy together with a copy of the praecipe mentioned herein.

Sept. 6, 1935.

DUANE BIRD

THOS. L. HALL

JAMES V. ROBINS

Attorneys for Defendant.

[Endorsed]: Filed Sep. 7, 1935. [20]

In the United States District Court for the
District of Arizona

United States of America,
District of Arizona.—ss.

I. J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation, Plaintiff, versus E. K. Cumming, Defendant, numbered L-654 Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 20, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$2.60 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said Court this 16th day of September, 1935.

[Seal] J. LEE BAKER, Clerk,
U. S. District Court,
District of Arizona,
By EDWARD W. SCRUGGS,
Chief Deputy Clerk. [21]

[Title of Court and Cause.]

CITATION ON APPEAL

The President of the United States of America to
E. K. CUMMING, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days from and after the date of this citation, pursuant to an order allowing the appeal duly made and entered and filed in the office of the Clerk of the above named district court, under date of the 6th day of September, 1935, which said appeal is from the final decree of said District Court in the above numbered and entitled cause, made and entered under date of the tenth day of June, 1935, wherein W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation, is plaintiff and appellant, and you are defendant and appellee, to show cause, if any there be, why said order and decree rendered against said plaintiff and appellant should not be reversed and set aside

and why justice should not be done to the parties in that behalf.

WITNESS the Honorable Albert M. Sames, United States District Judge for the District of Arizona, this 6th day [22] of September, 1935, A. D., and of the Independence of the United States of America the One Hundred sixtieth.

[Seal] ALBERT M. SAMES,
Judge of the United States District Court in and
for the District of Arizona.

We hereby accept service of the within citation on appeal and acknowledge receipt of a true copy thereof and personal service of citation at Nogales, Arizona, this 6th day of September, 1935.

DUANE BIRD,
THOS. L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant. [23]

[Endorsed]: No. 7990. United States Circuit Court of Appeals for the Ninth Circuit. W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, an insolvent corporation, Appellant, vs. E. K. Cumming, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 20, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.